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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CREDITORS ADJUSTMENT
BUREAU, INC.,

Plaintiff,

vs.

M. ROTHMAN & CO., INC.,

Defendant.

Case No: C08-01431 MMC

Assigned to: Hon. Maxine M. Chesney
Dept. 7

**NOTICE OF MOTION AND
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
ON WHICH RELIEF MAY BE
GRANTED (FRCP 12(b)(6)); OR, IN
THE ALTERNATIVE, AND
SUBJECT TO THE COURT'S
DISCRETION UNDER 28 U.S.C.
§ 1404, TO TRANSFER
PLAINTIFF'S CASE TO NEW
JERSEY DISTRICT COURT**

DATE: May 30, 2008
TIME: 9:00 a.m.
DEPT: 7

TRIAL DATE: Not Set

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS
OF RECORD:

NOTICE IS GIVEN that on May 30, 2008 at 9:00 a.m., or as soon thereafter
as this matter may be heard in Department 7 of the above-entitled Court located at
450 Golden Gate Avenue, San Francisco, CA 94102, defendant M. Rothman &

1 Co., Inc. will move the Court for an order dismissing the action pursuant to Federal
2 Rules of Civil Procedure, Rule 12(b)(6) on the grounds that plaintiff's claims are
3 barred by the doctrine of res judicata. In the alternative, Rothman will move for an
4 order transferring this case to the United States District Court for the District of
5 New Jersey under 28 U.S.C. § 1404(a).

6 The motion to dismiss is based upon the preclusive effects of a default
7 judgment entered in the New Jersey Superior Court against plaintiff's assignor in a
8 lawsuit filed by Rothman in December 2007 arising out of the same facts which
9 underlie plaintiff's contract claims in this action – a transactional business
10 relationship between Hannspree North America, Inc. and Rothman.

11 A discretionary transfer under 28 U.S.C. § 1404(a) is sought based upon the
12 deference given to a plaintiff's choice of forum and the fact that the initial lawsuit
13 between these parties was filed (and subsequently adjudicated) in a New Jersey
14 state court.

15 The motion will be based on this notice, the accompanying memorandum of
16 points and authorities, defendant's request for judicial notice; defendant's appendix
17 of non-California cases, all pleadings and papers on file in this case, and on such
18 other evidence as may be presented on or before the hearing on this motion.

19
20 DATED: April 18, 2008

CHASSMAN & SEELIG, LLP


21
22 By: 
23 RHONDA E. KALEY
24 Attorneys for Defendant
25 M. Rothman & Co., Inc.
26
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TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES	6
I. SUMMARY OF ARGUMENT	6
II. A MOTION TO DISMISS UNDER RULE 12(b)(6) PROPERLY TESTS THE SUFFICIENCY OF A RES JUDICATA DEFENSE	6
III. STATEMENT OF FACTS	7
A. The New Jersey Superior Court Action	7
B. The California Superior Court Action	9
IV. PLAINTIFF’S CONTRACT AND COMMON COUNT CLAIMS AGAINST ROTHMAN ARE BARRED BY THE RES JUDICATA DOCTRINE	10
A. Plaintiff, An Assignee, Takes Hanspree’s Claims Against Rothman Subject To Defenses	10
B. The Res Judicata Doctrine	11
C. New Jersey Law Regarding the “Entire Controversy Doctrine”	12
D. Under California Law, Rothman’s Default Judgment Bars Plaintiff’s Claims Arising Out of Hanspree’s Sale of Goods to Rothman	14
V. IN THE ALTERNATIVE, THE CASE SHOULD BE TRANSFERRED TO THE DISTRICT COURT OF NEW JERSEY UNDER 28 U.S.C. SECTION 1404(a)	16

TABLE OF AUTHORITIES

Cases

<i>Allen v. McCurry</i> , 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)	7
<i>Balistreri v. Pacifica Police Dept.</i> , 901 F.2d 696 (9th Cir. 1988)	7
<i>Brown v. Brown</i> , 170 Cal.1 (1915)	14
<i>Cahill v. Liberty Mut. Ins. Co.</i> , 80 F.3d 336 (9th Cir.1996)	6
<i>Circle Chevrolet Co. v. Giordano, Halleran & Ciesla</i> , 142 N.J. 280, 662 A.2d 509 (1995) . .	13
<i>Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association</i> , 60 Cal.App.4th 1053	12
<i>Clemmer v. Hartford Ins. Co.</i> , 22 Cal.3d 865 (1978)	11
<i>Conley v. Gibson</i> , 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)	6
<i>Day v. Moscow</i> , 955 F.2d 807 (2nd Cir. 1992)	7
<i>Fitzgerald v. Herzer</i> , 78 Cal.App.2d 127(1947)	15
<i>Horton v. Horton</i> 18 Cal.2d 579 (1941)	15
<i>Irish Pub v. Stover</i> , 364 N.J.Super. 351, 835 A.2d 1257 (2002)	13
<i>K-Land Corporation No. 28 v. Landis Sewerage Authority</i> , 173 N.J. 59, 800 A.2d 861 (2002)	12
<i>Morris v. Blank</i> , 94 Cal.App.4th 823	11
<i>Mycogen Corp. v. Monsanto Co.</i> , 28 Cal.4th 888 (2002)	11
<i>Navarri v. Antonovich</i> , 250 F.3d 729 (9th Cir. 2001)	6
<i>Olds v. Donnelly</i> , 150 N.J. 424, 696 A.2d 633 (1997)	13
<i>Palomar Mobilehome Park Ass'n v. City of San Marcos</i> , 989 F.2d 362 (9th Cir.1993)	7
<i>San Remo Hotel, L.P. v. City & County of San Francisco</i> , 545 U.S. 323, 125 S.Ct. 2491, 162	
L.Ed.2d 315 (2005)	7
<i>Scott v. Kuhlmann</i> , 746 F.2d 1377 (9th Cir. 1984)	7
<i>Securities Investor Protection Corp. v. Vigman</i> , 764 F.2d 1309 (9th Cir. 1985)	16
<i>Shambrum v. Frey</i> , 77 Cal.App.3d 465 (1978)	10
<i>Sporn v. Home Depot USA, Inc.</i> 126 Cal.App.4th 1294 (2005)	15
<i>Wittman v. Chrysler Corporation</i> , 199 Cal.App.3d 586 (1988)	15

Statutes

28 U.S.C. § 1404(a)	16
28 U.S.C. § 1738	7
Cal. Comm.Code § 9404(a) (Rev. UCC § 9-404(a))	10

Other Authorities

6 Witkin, <i>Cal.Proc. 4th</i> , Proceedings Without Trial, § 153, p. 570	15
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Rules

Federal Rules of Civil Procedure, Rule 12(b)(6)	<i>passim</i>
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

SUMMARY OF ARGUMENT

Plaintiff's accounting and breach of contract claims against M. Rothman & Co., Inc. arose out of a transactional business relationship between plaintiff's alleged assignor, Hannspree California Inc., and Rothman which began in or about June 2005. According to plaintiff, Rothman owes \$145,804.71 for "goods sold and delivered" by Hannspree to Rothman and for which Rothman has not paid.

On April 1, 2008, the Superior Court of New Jersey entered a \$437.29 default judgment in favor of Rothman and against Hannspree arising out of the same business relationship and the purchase and sale of the same goods during the same time period alleged in plaintiff's complaint.

As pled, plaintiff's money claims against Rothman are barred by the res judicata doctrine and this action should be dismissed under Federal Rule 12(b)(6).

II.

A MOTION TO DISMISS UNDER RULE 12(b)(6) PROPERLY TESTS THE SUFFICIENCY OF A RES JUDICATA DEFENSE

A Rule 12(b)(6) motion tests the legal sufficiency of the claim or claims stated in the complaint. *Navarri v. Antonovich*, 250 F.3d 729, 732 (9th Cir. 2001) A claim may be dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In deciding such a motion, all material allegations of the complaint are accepted as true, as well as the reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir.1996) Dismissal is proper where there is no cognizable legal theory or an absence of sufficient facts alleged

1 to support a cognizable legal theory. *See, Balistreri v. Pacifica Police Dept.*, 901
 2 F.2d 696, 699 (9th Cir. 1988) A matter that is properly the subject of judicial
 3 notice may be considered along with the complaint when deciding a motion to
 4 dismiss for failure to state a claim, *i.e.*, the court may take notice of official records
 5 to determine the defense of res judicata when “all relevant facts are shown by the
 6 court’s own records of which the court takes notice.” *Day v. Moscow*, 955 F.2d
 7 807, 811 (2nd Cir. 1992)

8 Res judicata may be raised in a motion to dismiss under Rule 12(b)(6). *Scott*
 9 *v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) Generally “[u]nder res judicata,
 10 a final judgment on the merits of an action precludes the parties or their privies
 11 from relitigating issues that were or could have been raised in that action.” *Allen v.*
 12 *McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). [Emphasis
 13 added.]

14 Federal courts are required to give full faith and credit to state court
 15 judgments under 28 U.S.C. § 1738. *See, San Remo Hotel, L.P. v. City & County of*
 16 *San Francisco*, 545 U.S. 323, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). To
 17 determine the preclusive effect of a state court judgment federal courts look to state
 18 law. *Palomar Mobilehome Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364
 19 (9th Cir.1993).

20 21 **III.**

22 **STATEMENT OF FACTS**

23 **A. The New Jersey Superior Court Action**

24 On December 19, 2007, Rothman filed a complaint in the Superior Court of
 25 New Jersey (Docket No. L-9289-07) against Hannspree North America, Inc.¹ for
 26

27 ¹ Based upon records obtained from the California Secretary of State,
 28 Hannspree California, Inc., plaintiff’s assignor, has been “merged out.” Hannspree
 North America, Inc., the defendant in the New Jersey action, is located at the same

1 breach of contract and declaratory relief based upon a business relationship
2 pursuant to which Rothman purchased merchandise from Hannspree. *See*, Request
3 for Judicial Notice (RJN), Exhibit 2.

4 The New Jersey complaint alleged that:

- 5 • Rothman purchased merchandise from Hannspree. (RJN, Exhibit
6 2, ¶ 4)
- 7 • Pursuant to the parties' agreement, Rothman had the right to return
8 merchandise it purchased from Hannspree and receive credit for
9 those returns. (RJN, Exhibit 2, ¶ 5)
- 10 • Rothman maintained a book account in connection with its
11 purchases from Hannspree that reflected a running balance, taking
12 into account amounts due to Hannspree from Rothman, amounts
13 due from Hannspree to Rothman, payments by Rothman to
14 Hannspree and credits due to Rothman from Hannspree. (RJN,
15 Exhibit 2, ¶ 7)
- 16 • Hannspree owed Rothman \$437.29. (RJN, Exhibit 2, ¶ 8)
- 17 • Hannspree failed and refused to pay Rothman the \$437.29 and
18 instead "alleged that Rothman owes Hannspree significant
19 amounts in excess of the jurisdictional limit for cases to be filed in
20 the Law Division of the Superior Court of the State of New
21 Jersey." (RJN, Exhibit 2, ¶¶ 9 and 10)
- 22 • As a result of Hannspree's failure and refusal to pay the amount
23 due to Rothman, and Hannspree's "continuous and erroneous
24 insistence" that Rothman owed money to Hannspree, there was an

25
26 address in Fremont, California, and is the sole entity currently registered with the
27 Secretary of State. Although standing issues may exist as to Hannspree California
28 Inc., Rothman has not raised those issues in this motion since Creditors
Adjustment Bureau, Inc. is a California corporation in good standing. RJN,
Exhibit 8.

1 actual and justiciable controversy presently existing between the
2 parties. (RJN, Exhibit 2, ¶ 16)

3 Hannspree's California agent for service of process was served with the New
4 Jersey summons and complaint on December 27, 2007. RJN, Exhibits 4 and 8.
5 Hannspree failed to respond to the complaint and, upon Rothman's request, a
6 default was entered by the New Jersey Superior Court Clerk on February 25, 2008.
7 RJN, Exhibit 5.

8 On April 1, 2008, Larry Francis, Rothman's chief financial officer, filed,
9 with notice to Hannspree, a Certification of Proof under oath, documenting the
10 transactional account between Rothman and Hannspree in support of Rothman's
11 application for a default judgment against Hannspree. RJN, Exhibit 6. Francis'
12 declaration sets forth the historical business dealings between the parties, including
13 a financial accounting of debits and credits. *Id.* The Superior Court determined
14 based upon the evidence presented that Hannspree owed \$473.27 to Rothman, and,
15 on April 1, 2008, entered a judgment in that amount in favor of Rothman and
16 against Hannspree. (RJN, Exhibit 7) This judgment conforms to the prayer of the
17 complaint.

18 **B. The California Superior Court Action**

19 Plaintiff's complaint filed on February 4, 2008 in the Alameda County
20 Superior Court and removed to this Court on March 13, 2008 alleges nearly
21 identical facts regarding the parties' business dealings, but seeks a \$145,804.71
22 judgment against Rothman. The complaint alleges that:

- 23 • Plaintiff's assignor, Hannspree, and Rothman entered into
24 written agreements in June and August 2005 "wherein
25 Plaintiff's Assignor agreed to sell and deliver the goods and/or
26 render the services described [in the agreements]" and that
27 Rothman "agreed to pay therefore." (RJN, Exhibit 1, ¶ 18)

- Hannspree provided goods to Rothman at Rothman's request. (RJN, Exhibit 1, ¶ 9)
- Rothman "failed and refused to pay" for the goods and services. (RJN, Exhibit 1, ¶¶ 19)
- Rothman owes \$145,804.71 to plaintiff's assignor. (RJN, Exhibit 1, ¶¶ 2, 9, 12, 15, and 19)

The relief sought in both actions is identical – money owed from one party to the other as a result of their business relationship. Both complaints demand a money judgment.

All outstanding accounting issues between the parties were necessarily adjudicated in the New Jersey lawsuit. To hold otherwise now would result in an injustice to Rothman.

IV.

PLAINTIFF'S CONTRACT AND COMMON COUNT CLAIMS AGAINST ROTHMAN ARE BARRED BY THE RES JUDICATA DOCTRINE

A. Plaintiff, An Assignee, Takes Hannspree's Claims Against Rothman Subject To Defenses

Under California law, Credit Adjustment Bureau's causes of action are subject to all the defenses and offsets which Rothman could raise if the action had been filed by Hannspree instead of the assignee. *Shambrum v. Frey*, 77 Cal.App.3d 465, 469 (1978) *See also*, Cal. Comm.Code § 9404(a) (Rev. UCC § 9-404(a))²

² California Commercial Code §9404(a) states in pertinent part: "Unless an account debtor has made an enforceable agreement not to assert defenses or claims . . . the rights of an assignee are subject to both of the following: (1) All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract[; and] (2) Any other defense or claim of the account debtor against the assignor which

B. The Res Judicata Doctrine

The res judicata doctrine bars relitigation of a claim “when [a] prior action 1) raised the same claim, (2) resulted in a final judgment on the merits, and 3) the party against whom the claim is asserted was a party to or was in privity with a party to the prior action. *Clemmer v. Hartford Ins. Co.*, 22 Cal.3d 865, 875 (1978). California’s res judicata doctrine is based on a primary rights theory. As the California Supreme Court held in *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888 (2002):

“[A] ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action.”

Id. at 904.

Under this analysis, a party may bring only one cause of action to vindicate a primary right. *Id.* at 897. Claims not raised in this single cause of action may not be raised at a later date. *Id.*

In order for res judicata to apply, the cause of action in the subsequent litigation must be identical to that in the first. *Morris v. Blank*, 94 Cal.App.4th 823, 831. Collateral estoppel applies only if the issues decided in the prior adjudication are identical to those raised in the present action. *Id.*, at 832. In determining whether a later proceeding is based on the same primary right as in an earlier action, courts will “compare the two actions, looking at the rights which are sought to be vindicated and the harm for which redress is claimed. Reference must be

accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.”

made to the pleadings and proof in each case.” *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association*, 60 Cal.App.4th 1053, 1067 [internal quotations and citations omitted.]

C. New Jersey Law Regarding The “Entire Controversy Doctrine”

Having been filed in the New Jersey Superior Court, Rothman’s action against Hannspree was and is subject to New Jersey law. In *K-Land Corporation No. 28 v. Landis Sewerage Authority*, 173 N.J. 59, 800 A.2d 861 (2002),³ the New Jersey Supreme Court discussed the application of the “entire controversy doctrine” codified in New Jersey Rule 4:30A. That rule provides that: “Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.”

As cited in numerous cases applying the rule, in comments to Rule 4:30, Judge Sylvia B. Pressler stated:

“The entire controversy doctrine, an equitable preclusionary doctrine whose purposes are to encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency, was originally conceived of as a claim-joinder mandate, requiring all parties in an action to raise in that action all transactionally related claims each had against any other whether assertible by complaint, counterclaim, or cross-claim . . . [¶] The rule as to claim joinder continues to require . . . that all aspects of the controversy between

³ Copies of the cited New Jersey cases are included in Defendant’s Appendix of Non-California Authority filed and served concurrently.

those who are parties to the litigation be included in a single action.”

See, K-Land Corporation No. 28 v. Landis Sewerage Authority, 173 N.J. 59, 70, 800 A.2d 861, 868 (2002); *Irish Pub v. Stover*, 364 N.J.Super. 351, 354-355 835 A.2d 1257, 1259 (2002).

In *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 142 N.J. 280, 662 A.2d 509 (1995) (abrogated on other grounds in *Olds v. Donnelly*, 150 N.J. 424, 696 A.2d 633 (1997)), the New Jersey Supreme Court, in discussing the evolution of the entire controversy doctrine, held:

“The entire controversy doctrine seeks to further the judicial goals of fairness and efficiency by requiring, whenever possible, “that the adjudication of a legal controversy should occur in one litigation in only one court. [Citation.] ‘The point of course, is that a component of the controversy may not be unfairly withheld, and a withholding is by definition unfair if its effect is to render the pending litigation merely one inning of the whole ball game.’ [Citation.] The rule has been extended to include all affirmative claims that a party might have against another party, including counterclaims and cross-claims . . . [Citation.]”

Id. at 513. [Emphasis added.]

Under the New Jersey rule, Hannspree’s money claims against Rothman arising out of the parties’ business relationship were mandatory cross-claims in the New Jersey action. Because Hannspree did not respond to Rothman’s complaint, much less assert its mandatory cross-claims, Hannspree should not be allowed to now assert those same claims in an action filed in California. Indeed, Hannspree’s California action, brought through an assignee, is an improper, unfair, and legally

1 impermissible collateral attack on the New Jersey judgment. Hannspree had a fair
 2 and reasonable opportunity to litigate its existing monetary claims against
 3 Rothman in the New Jersey court. The fact that it chose not to do so precludes
 4 Hannspree from now litigating those claims in this Court.

5 **D. Under California Law, Rothman's Default Judgment Bars Plaintiff's**
 6 **Claims Arising Out of Hannspree's Sale of Goods To Rothman**

7 Rothman's action against Hannspree in New Jersey was filed on December
 8 19, 2007 in the Superior Court of New Jersey. RJN, Exhibit 2. Hannspree was
 9 served with the New Jersey summons and complaint on December 27, 2007, but
 10 failed to respond. RJN, Exhibits 3, 4, and 5. A default judgment against
 11 Hannspree was entered on April 1, 2008. RJN, Exhibit 7.

12 The California action, based upon identical facts regarding the transactional
 13 activities between the parties, was filed on February 4, 2008. RJN, Exhibit 1. At
 14 that point in time, Hannspree was already in default in the New Jersey action,
 15 although the default had not yet been entered by the court clerk.⁴

16 In *Brown v. Brown*, 170 Cal.1, 5 (1915), the California Supreme Court held
 17 that default judgments were conclusive as to issues raised by the complaint:

18 "The [default] judgment . . . is, in contemplation of law, a
 19 complete adjudication of all the rights of the parties
 20 embraced in the prayer for relief and arising from the
 21 facts stated in the complaint, including the facts in
 22 [defendant's] favor as well as those against him. The
 23 defendant . . . is presumed to have acceded to the
 24 proposition embraced in the complaint and to have

25
 26 ⁴ The New Jersey summons states that a response to the complaint must be
 27 filed within 35 days from the date of receipt. RJN, Exhibit 3. The complaint was
 28 personally served on Hannspree's registered agent on December 27, 2007. RJN,
 Exhibit 4. Therefore, Hannspree's response was due on or before January 31,
 2008.

1 consented that plaintiff should obtain the relief therein
2 prayed for, upon the conditions and facts set forth in the
3 complaint.”

4 *See also, Horton v. Horton* 18 Cal.2d 579, 585 (1941) [“A default judgment
5 is an estoppel as to all issues necessarily litigated therein and determined thereby
6 exactly like any other judgment provided the court acquired jurisdiction of the
7 parties and subject-matter involved in the lawsuit.”]; *Fitzgerald v. Herzer*, 78
8 Cal.App.2d 127, 131 (1947) [“A judgment by default is as conclusive as to the
9 issues tendered by the complaint as if it had been rendered after answer filed and
10 trial had on allegations denied by the answer”]; *Sporn v. Home Depot USA, Inc.*
11 126 Cal.App.4th 1294, 1303 (2005) [because the default admits plaintiff’s
12 allegations, defaulting defendant lacked standing to complain of extraneous
13 evidence introduced at prove-up hearing]; 6 Witkin, *Cal.Proc.* 4th, Proceedings
14 Without Trial, § 153, p. 570 [“A judgment by default is said to ‘confess’ the
15 material facts alleged by the plaintiff, *i.e.*, the defendant’s failure to answer has the
16 same effect as an express admission of the matters well pleaded in the complaint.
17 The judgment is, in consequence, *res judicata* on the issue of the right to the relief
18 awarded.” (Emphasis added).]

19 All issues relating to the accounting – the application of credits and debits –
20 between Hannspree and Rothman were first raised and have been adjudicated in
21 the New Jersey action. “Once an issue is raised and determined after a trial on the
22 merits or a consent judgment, that determination is binding in a subsequent action
23 notwithstanding that a party may have failed to raise arguments against it which, if
24 asserted, might have produced a different outcome.” *Wittman v. Chrysler*
25 *Corporation*, 199 Cal.App.3d 586, 592 (1988) [Emphasis added.]

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Hannspree, through its assignee, cannot now relitigate transactional accounting issues between it and Rothman in a California court. The New Jersey court has ruled, based upon admissible and undisputed evidence, that Hannspree owes Rothman \$437.29. In reaching that result, the New Jersey court necessarily adjudicated (and extinguished) Hannspree's money claims against Rothman arising out of the business dealings between the parties.

V.

**IN THE ALTERNATIVE, THE CASE SHOULD BE
TRANSFERRED TO THE DISTRICT COURT OF NEW JERSEY
UNDER 28 U.S.C. § 1404(a)**

If the case cannot be dismissed, Rothman respectfully requests an order transferring the case to the U.S. District Court in New Jersey. A plaintiff's choice of forum is accorded substantial weight in proceedings under section 1404(a). *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985). Rothman is a New Jersey corporation with its principal place of business in Ramsey, New Jersey.⁵ Rothman commenced its action against Hannspree in the New Jersey Superior Court two months before Hannspree's assignee filed the California action and Hannspree did not object to the jurisdiction of the New Jersey Court. A New Jersey state court has already adjudicated facts relating to the parties' business dealings in favor of Rothman.


Under New Jersey's entire controversy doctrine, Hannspree's claims against Rothman could have been (indeed, should have been) brought in the New Jersey Superior Court in the first place, not in a California court.

⁵ See, Rothman's Notice of Removal previous filed in this action on March 12, 2008.

1 Therefore, in the interests of justice, Rothman respectfully requests that the
2 case, if not dismissed under Rule 12(b)(6), be transferred to the U.S. District Court
3 in New Jersey.

4
5
6 DATED: April 18, 2008

Respectfully submitted,
CHASSMAN & SEELIG, LLP

7
8 By: 
9 RHONDA E. KALEY
10 Attorneys for Defendant
11 M. Rothman & Co., Inc.
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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is: 350 South Figueroa Street, Suite 580, Los Angeles, California 90071-1102.

On April 21, 2008, I served the foregoing documents described as **NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED (FRCP 12(b)(6); OR, IN THE ALTERNATIVE, AND SUBJECT TO THE COURT'S DISCRETION, TO TRANSFER PLAINTIFF'S CASE TO NEW JERSEY DISTRICT COURT UNDER 28 U.S.C. § 1404** on the interested parties in this action by placing a true copy thereof enclosed in a sealed, prepaid envelope addressed as follows:

Kenneth J. Freed, Esq.
Law Offices of Kenneth J. Freed
14226 Ventura Boulevard
P.O. Box 5914
Sherman Oaks, CA 91413

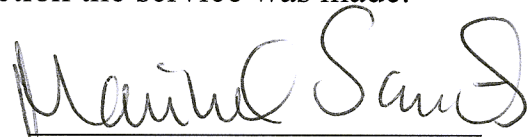
X (BY MAIL) I caused such envelope to be deposited in the mail at Los Angeles, California. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than 1 day after the date of deposit for mailing in affidavit.

____ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on April 21, 2008 at Los Angeles, California.

X (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

MARIBEL SANTOS
NAME


SIGNATURE